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23 UNITED STATES DISTRICT COURT  
24 NORTHERN DISTRICT OF CALIFORNIA  
25 SAN FRANCISCO DIVISION

26 UNITED STATES OF AMERICA, ) Case No.: CR 07-0732 SI  
27 )  
28 Plaintiffs, )  
29 vs. ) MOTION IN LIMINE NO. 2  
30 BARRY LAMAR BONDS, )  
31 ) MOTION TO ENFORCE THE  
32 ) COURT'S FEBRUARY 19, 2009  
33 ) ORDER REGARDING THE  
34 ) ADMISSIBILITY OF LAY WITNESSES'  
35 ) TESTIMONY DESCRIBING ALLEGED  
36 ) SIDE-EFFECTS OF ANABOLIC  
37 ) STEROIDS AND RELATED EXPERT  
38 ) TESTIMONY

39 Date: March 1, 2011, Time: 3:30 pm  
40 Hon: Susan Illston

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## I. INTRODUCTION

Defendant Barry Bonds seeks to enforce this Court's previous orders regarding the admissibility of: (1) lay witnesses' testimony concerning their observations of physical characteristics and/or behavior of Mr. Bonds allegedly attributable to his use of performance-enhancing drugs and (2) expert opinion testimony regarding the lay witnesses' alleged observations. Over the months preceding the government's pretrial appeal to the Ninth Circuit, there was extensive litigation of these issues. The Court made several preliminary rulings, including: (1) an order denying without prejudice Mr. Bonds' motion to exclude Dr. Bowers' expert opinions "on the side effects of HGH and anabolic steroids," subject to the government's offer of proof that Mr. Bonds "developed some of the symptoms Dr. Bowers will describe," and (2) an order requiring the government to present a declaration under seal from Kim Bell, the "only ... lay witness" on the government's witness list proffered to testify to changes "in Bonds' physical or mental condition," that the Court would use "to determine whether her proposed testimony is admissible under Fed. R. Evid. 401, 402, 403 and 701." February 19, 2009 Order, Dkt.#137, at 19-20. (Hereafter, the "February 19<sup>th</sup> Order.") In compliance with the February 19<sup>th</sup> Order, the government filed Ms. Bell's declaration on February 24, 2009. However, the Court did not rule on the issue prior to the government taking its pretrial appeal. We ask the Court to revisit these issues and to implement its ruling.

## II. PROCEDURAL HISTORY

On January 15, 2009, Mr. Bonds filed a motion in limine to exclude, among other things, expert and lay opinion testimony describing the alleged effects of anabolic steroids and other performance enhancing drugs. In its opposition papers, the government proffered a declaration from Larry Bowers, Ph.D, a chemist, who offered the following with regard to the effects of anabolic steroids:

1 Testosterone is a chemical that causes muscle growth and retention of muscle. It can  
2 make a person stronger and it can benefit a person's ability to recover, i.e. it can enable  
3 a person to work muscles more often and harder than without the assistance of  
4 testosterone. Exogenous, or foreign testosterone, can cause a variety of physiological  
5 effects in a person, including acne, physiological effects to the genitalia, an ability to  
6 rapidly increase muscle mass, and other effects.

7 Declaration of Larry Bowers, dated January 26, 2009, at 3, Exhibit 2 to Government's  
8 Opposition To Defendants' Motion In Limine, Dkt.# 100, ("Bowers Decl. I"). Dr. Bowers  
9 went on to describe alleged side-effects of Human Growth Hormone, insulin, and EPO. *Id.*  
10 at 3-4. Regarding the testimony of lay witnesses, the government stated that it would not  
11 seek to elicit their opinions that any changes they allegedly observed were attributable to  
12 Mr. Bonds' use of anabolic steroids. Rather, the government announced that its then-  
13 unidentified lay witnesses would "testify only to changes they observed in Bonds' physical  
14 or mental condition," and urged that the relevance of that lay testimony would "be  
15 established by expert testimony from Dr. Bowers ... that steroid use results in specific  
16 mental and physical changes in the user." Government Opposition, at 52.

17 On February 13, 2009, the government filed a Supplemental Brief In Support of  
18 Admissibility of Expert Opinion Testimony, Dkt.#128, and presented a second declaration  
19 from Dr. Bowers. In this declaration, Dr. Bowers opined that:

20 [a]nabolic steroids ... can cause ... increased hair growth on the trunk and  
21 extremities (primarily in women), male pattern baldness, the development of  
22 acne, particularly on the upper back, decrease in testicular size, increased  
23 aggressiveness, feelings of invincibility, "roid rage," weakening of the heart,  
24 hypertension, injury to the liver and possible links to prostate cancer.

25 Bowers' Declaration, Feb. 13, 2009, ¶ 3, Dkt.#128 ("Bowers Decl. II"). As to HGH, Dr.  
26 Bowers described the potential side effects as "increase in the size of one's head or skull,  
27 jaw, hands and fingers, and feet and toes, as well as improved eyesight." *Id.* at ¶ 5. Also,  
28 on February 13, 2009, the government filed its Witness List, which included a description  
of the expected testimony of Kimberly Bell, Mr. Bonds' former girlfriend, as follows:  
"personal observations regarding changes in the defendant's body during the period of time

1 of beginning in the year 2000, including bloating, acne on the shoulders and back, hair loss,  
2 and testicle shrinkage.” Government Witness List, Dkt.#123, at 2.

3 In his response, Mr. Bonds challenged the admissibility of the proffered testimony  
4 on two grounds: (1) the lack of a scientific basis for several of Dr. Bowers’ opinions, and  
5 (2) the lack of a factual predicate rendering those opinions relevant to this case. Defendant  
6 Bonds’ Supplemental Memorandum RE: Admissibility of Government’s Proffered Expert  
7 Testimony, Dkt.# 133, at 1. Mr. Bonds supported these assertions with the Declaration of  
8 Ronald Swerdloff, M.D., together with numerous scientific studies and reviews. A copy of  
9 Dr. Swerdloff’s Declaration is attached as Exhibit A.<sup>1</sup> Based upon the record and Dr.  
10 Swerdloff’s opinions, Mr. Bonds lodged objections to lay witness testimony supposedly  
11 describing possible side effects of anabolic steroids, including the following:  
12

13 • **Testicular atrophy.** The only asserted factual predicate was the proffered  
14 testimony of Kimberly Bell, a former girlfriend who says she was wronged by Mr.  
15 Bonds, pressed a legal claim against him, shopped a book about their relationship,  
16 and went on various talk shows to publicize her appearance in Playboy. Ms. Bell  
17 now claims to have noticed that Mr. Bonds’ testicles became smaller while they  
18 were involved together. No one else supports this claim, certainly not any of Mr.  
19 Bonds’ many trainers and attending physicians. It is undisputed that any effect from  
20 testosterone is nearly impossible for a non-medical professional to detect because  
21 even when the testes atrophy, the size of the scrotum does not. Given the relatively  
22 small effect, an untrained layperson would have difficulty discerning it even by  
23 touch. Swerdloff Declaration, Exhibit A at 4.c. As a consequence, even when the  
24 effect occurs, it cannot be visually recognized, most *patients* are not even aware of  
25 the effect, and detection usually requires a medical examination by a trained  
26

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27 <sup>1</sup>Dr. Swerdloff’s impressive credentials are found in his curriculum vitae, attached to  
28 Bonds’ Supplemental Memorandum as Exhibit C, Dkt.# 133.

1 examiner using a special device called an “orchidometer” to document any reduction  
2 in size. Swerdloff Declaration, Exhibit A at 4.c. Thus, Ms. Bell’s testimony would  
3 relate to phenomena that are extremely unlikely if not impossible for a lay person to  
4 detect visually or even by touch. Her proffered testimony is not credible. Nor is it  
5 worthy of a federal court. Finally, the government’s presentation of testimony from  
6 the former girlfriend would invite the defense to present contradictory evidence from  
7 other witnesses, creating a time-consuming and distracting circus within a trial.

8 • **Psychological Effects – aggressiveness, feelings of invincibility, and “roid rage.”**

9 Dr. Swerdloff opined that the study results concerning psychological effects are  
10 decidedly mixed and that there is no agreement in the scientific community.  
11 Swerdloff Declaration, Exhibit A at 4.d. The government proffered only the  
12 declaration of Ms. Bell to fulfill the requirement of a factual predicate. It is  
13 apparently Ms. Bell’s position that Mr. Bonds was always threatening – for years  
14 both before and after the government alleges that Mr. Bonds ingested steroids – but  
15 that his behavior became more frequent and pronounced toward the end of their  
16 relationship when they were breaking up. Because such testimony is so patently  
17 subjective and intrusive into the realm of prohibited character evidence, and because  
18 there is a dispute whether the phenomenon is accepted by the scientific community,  
19 any limited relevance of Ms. Bell’s testimony is substantially outweighed by its  
20 prejudice under Rule 403.  
21

22 • **Male pattern baldness.** Again, Ms. Bell is apparently the only witness to offer the  
23 factual predicate. Since millions of American men experience balding without  
24 ingesting steroids, the fact that Mr. Bonds might be bald has no probative value to  
25 show that he took steroids, even assuming a temporal link, which the government  
26 has not demonstrated. Moreover, Dr. Swerdloff concludes that there is no evidence  
27 that exogenous anabolic steroids cause baldness in an otherwise healthy male with  
28

1 normal levels of testosterone, as opposed to women and children. Swerdloff  
2 Declaration, Exhibit A at 4.b.

3 • **Hair growth on the trunk and extremities.** The government proffered no  
4 percipient witness testimony for the factual predicate that hair growth occurred.  
5 There is no scientific evidence demonstrating that the ingestion of an anabolic  
6 steroid had the effect of increasing hair growth in an otherwise healthy adult male.  
7 Swerdloff Declaration, Exhibit A at ¶ 4.a.

8 • **Prostate cancer.** The government has proffered no witness on this point. Scientific  
9 studies do not support the assertion that anabolic steroids cause prostate cancer.  
10 Swerdloff Declaration, Exhibit A at 4.e.

11  
12 In its February 19<sup>th</sup> Order, this Court addressed the admissibility of the  
13 government's proffered expert and lay opinion testimony. The Court denied without  
14 prejudice Mr. Bonds' motion to exclude Dr. Bowers' expert testimony concerning "the  
15 physical symptoms exhibited by individuals who use anabolic steroids and human growth  
16 hormone." February 19<sup>th</sup> Order at 20. The Court, however, required an offer of proof  
17 "before Dr. Bowers testifies establishing that there is or will be evidence in the record that  
18 the defendant developed some of the symptoms Dr. Bowers will describe." Order at 19.  
19 Regarding lay opinion testimony, the Court found that Kimberly Bell was only lay witness  
20 proffered on the issue and ordered the government to submit Ms. Bell's declaration  
21 "containing as complete an offer of proof as she is able to make at this time, as well as the  
22 foundation for her testimony." February 19<sup>th</sup> Order at 20. The Court then stated it would  
23 use the declaration to "determine whether her proposed testimony is admissible under Fed.  
24 R. Evid. 401, 402, 203 and/or 701." *Id.*

25 On February 27, 2009, the government announced that it was appealing from other  
26 aspects of the February 19<sup>th</sup> Order. This Court never ruled on the admissibility of Ms.  
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1 Bell's proffered testimony or on related issues. We now ask the Court to address those  
2 issues.

### 3 **III. ARGUMENT**

4 Mr. Bonds does not ask the Court to review its previous rulings.<sup>2</sup> As noted above,  
5 we understand those rulings to be that: (1) the government has sufficiently established Dr.  
6 Bowers' expertise concerning the physical symptoms of steroids and HGH to permit his  
7 testimony on those subjects, (2) before admitting Dr. Bowers' testimony, the government  
8 will be required to make a showing that Mr. Bonds developed the symptoms that Dr.  
9 Bowers will describe, and (3) the Court would rule (but has not yet ruled) on the  
10 admissibility of the government's proffered lay percipient witnesses' – e.g. Kimberly Bell's  
11 – testimony describing alleged changes that they allegedly observed in Mr. Bonds. In this  
12 context, we ask the Court to implement these rulings and to exclude: (1) lay witness  
13 testimony that is irrelevant and/or unduly prejudicial, and (2) proffered expert testimony  
14 concerning side effects for which there is no factual predicate in the record.  
15

#### 16 **A. Exclude the Testimony of Kimberly Bell and Other Lay Witnesses** 17 **Concerning Specific Alleged Physical or Mental Changes in Mr. Bonds**

##### 18 **1. Kimberly Bell**

19 We ask the Court to exclude the testimony of Kimberly Bell concerning her alleged  
20 observations of specific physical and mental changes in Mr. Bonds, including especially  
21 any testimony concerning the size of his testicles, sexual performance, bloating, and angry  
22 or violent behavior.<sup>3</sup> As elaborated below, her testimony on these issues is irrelevant and  
23 unduly prejudicial for either of two reasons: (1) even the government's expert has not  
24 stated that the alleged observation is a side effect associated with anabolic steroids, or (2)  
25

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26 <sup>2</sup>At appropriate times, Bonds will continue to preserve those objections.

27 <sup>3</sup>The defense does not object to the government's proffer of Ms. Bell's alleged  
28 observations that Mr. Bonds got bigger and had acne on his back.

1 the proffered testimony lacks foundation, is uncorroborated and will necessitate refutation  
2 by defense witnesses.

3       **a. Testicular atrophy.** Ms. Bell's declaration fails to establish an adequate  
4 foundation for alleged observations involving Mr. Bonds' private parts. Given Dr.  
5 Swerdloff's Declaration, it is undisputed that any effect exogenous testosterone might have  
6 on the size of the testes would be minimal and indiscernible to all but a trained medical  
7 examiner. Swerdloff Declaration, Exhibit A at 4.c. Ms. Bell's declaration fails to establish  
8 an adequate foundation for her testimony. Ms. Bell's asserted observations are  
9 uncorroborated by any other witness, lay or professional, and would require the defense to  
10 present contradictory observations from other witnesses. The proffered testimony is not  
11 credible and is not worthy of a federal court. Accordingly, the declaration is not sufficient  
12 to overcome the defense challenges to "foundation, relevance or unfair prejudice."  
13 February 19th Order, at 20.

14       **b. Sexual performance/Duration of Erections.** Dr. Bowers' Declarations do not  
15 identify sexual performance as a side effect of anabolic steroids. The alleged observations  
16 are uncorroborated by any other witness, lay or professional, and would require the defense  
17 to present contradictory observations from other witnesses. The testimony is therefore  
18 irrelevant and unduly prejudicial.

19       **c. Bloating.** Dr. Bowers' Declarations do not identify bloating as a side effect of  
20 anabolic steroids. Ms. Bell's alleged observations are uncorroborated by any other witness,  
21 lay or professional, and would require the defense to proffer contradictory observations  
22 from other witnesses. This testimony should be excluded as irrelevant and unduly  
23 prejudicial.

24       **d. Hair Growth on Chest.** Although she does not say it directly, apparently the  
25 government intends to present Ms. Bell's testimony as circumstantial evidence that Mr.  
26 Bonds exhibited hair growth on his chest. Dr. Swerdloff states unequivocally that there is  
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1 no science supporting the proposition that anabolic steroids have this effect on an otherwise  
2 healthy adult male. Swerdloff Declaration, Exhibit A at ¶ 4.a. This testimony should be  
3 excluded as irrelevant, lacking foundation and unduly prejudicial.

4 **e. Anger and Violence.** Ms. Bell does not contend that Mr. Bonds developed a  
5 new or different temperament or behavior during the course of their relationship. Rather,  
6 she asserts that some characteristics became more frequent and severe toward the end of  
7 their relationship. Her declaration is the only testimony proffered by the government on  
8 this issue and would necessitate the defense to present contradictory observations from  
9 other witnesses that Mr. Bonds' temperament, however described, did not change over the  
10 years. Dr. Swerdloff concludes that the scientific evidence for such psychological effects  
11 are "controversial" and "decidedly mixed." Swerdloff Declaration, Exhibit A at 4.d. This  
12 testimony should be excluded as irrelevant and unduly prejudicial.

13 **f. Male Pattern Balding.** This alleged observation is perhaps most clearly subject  
14 to the objection: What does that prove? Baldness is a common, naturally occurring  
15 development in adult males. Dr. Swerdloff stated that no scientific studies and, more  
16 specifically, that none of the literature cited by Dr. Bowers, supports the proposition that  
17 exogenous anabolic steroids can cause baldness in an otherwise healthy male with normal  
18 levels of testosterone, as opposed to women and children. Swerdloff Declaration, Exhibit  
19 A at 4.b. This testimony should be excluded as irrelevant and unduly prejudicial.

20 In conclusion, Ms. Bell's assertions that Mr. Bonds became bloated and that his  
21 sexual performance suffered are irrelevant and should be excluded because the  
22 government's expert has not identified them to be possible side effects of anabolic steroids.  
23 Her testimony regarding changes in the size of his private parts should be excluded for lack  
24 of foundation and because any limited relevance is outweighed by the potential prejudice,  
25 confusion and waste of time. Finally, Ms. Bell's testimony concerning alleged baldness,  
26 hair growth and anger or violence should be excluded because the observations are of  
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1 limited relevance and will result in undue prejudice, confusion and waste of time.

2 Accordingly, the proffered testimony should be excluded under Rules 402 and 403.

3 **2. Stan Conte and Arthur Ting**

4 On October 15, 2010, the government filed a second Witness List that continues to  
5 identify Kimberly Bell as an individual who will testify concerning specific changes that  
6 she supposedly observed in Mr. Bonds' physical appearance. Government Witness List,  
7 Dkt.#185, at 2. In addition, the government states that: (1) former San Francisco Giants'  
8 coach Stan Conte will testify to unspecified "observations related to the defendant's  
9 physical appearance while working for the Giants," and (2) Dr. Arthur Ting, an orthopedic  
10 surgeon who performed several surgeries on Mr. Bonds, will similarly testify "as to his  
11 physical observations of the defendant." Government Witness List, Dkt.#185, at 3 and 6.  
12 Over the last three and a half years of litigation, the government has proffered no other lay  
13 witnesses on this subject matter.  
14

15 The government's proffers concerning the testimony of Mr. Conte are Dr. Ting are  
16 insufficient to permit the Court to evaluate their admissibility. Two years after this Court  
17 established the ground rules for admissibility, the government has not made a meaningful  
18 and comprehensible proffer concerning these witnesses testimony. Accordingly, their  
19 testimony on this subject should be excluded.

20 **3. Other Relief**

21 Finally, we ask the Court preclude the government from seeking to present evidence  
22 concerning changes in Mr. Bonds' physical or mental condition from any source. Given  
23 the late stage of these proceedings and the government's numerous opportunities to present  
24 such evidence during the extensive litigation of these issues over the last three and a half  
25 years, such an order is both fair and appropriate to facilitate the orderly presentation of  
26 evidence at trial while avoiding unfair surprise.  
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**B. Exclude Specific Expert Opinions that Lack a Factual Predicate**

Numerous of Dr. Bowers' opinions are irrelevant because the government has not proffered or should be precluded from offering any evidence to establish that Mr. Bonds exhibited the alleged side effect. Absent the factual predicate, the expert opinion is irrelevant and prejudicial.

The first hurdle that a proponent of expert opinion testimony, in this case the government, must clear under *Daubert* and Rule 702 is relevance. In other words, the government must demonstrate that its proffered evidence tends "to make the existence of any fact that is of consequence to the determination of the action more probable or less probable... ." Rule 401, Fed. Rules Evid. As the Ninth Circuit has explained:

Federal Rule of Evidence 702 provides that a court may admit testimony from a qualified expert if it will help the trier of fact understand the evidence or determine a fact in issue. Such evidence must still be relevant; "[e]xpert testimony which does not relate to any issue in the case is not relevant and, ergo, non-helpful." *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 591, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) (internal quotation marks and citation omitted).

*United States v. 87.98 Acres of Land*, 530 F.3d 899, 904 (9th Cir. 2008), *cert. denied*, 129 S.Ct. 606 (2008) (emphasis added). *See also United States v. Downing*, 753 F.2d 1224, 1242 (3d Cir. 1985) ("An additional consideration under Rule 702 - and another aspect of relevancy - is whether expert testimony proffered in the case is sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute"). The Supreme Court described this inquiry as a question of "fit" which "is not always obvious, and scientific validity for one purpose is not necessarily scientific validity for other, unrelated purposes." *Daubert*, 509 U.S. at 591.

To demonstrate this principle, the Court cited the following:

The study of the phases of the moon, for example, may provide valid scientific "knowledge" about whether a certain night was dark, and if darkness is a fact in issue, the knowledge will assist the trier of fact. However (absent creditable

1 grounds supporting such a link), evidence that the moon was full on a certain  
2 night will not assist the trier of fact in determining whether an individual was  
3 unusually likely to have behaved irrationally on that night. Rule 702's  
4 "helpfulness" standard requires a valid scientific connection to the pertinent  
inquiry as a precondition to admissibility.

5 *Id.* at 591 -592.

6 Here, based upon the government's Witness List and proffers, the following  
7 proffered opinions of Dr. Bower are irrelevant to these proceedings because the predicate  
8 fact either is not in issue or should be excluded by the Court:

9 **a. Testicular atrophy.** Bowers Decl. II, ¶ 3. The government has proffered only  
10 the testimony of Kim Bell on this issue. We have asked that it be excluded on the grounds  
11 that her testimony lacks foundation and will be unduly prejudicial, confusing, etc.  
12 Assuming the motion is granted, Dr. Bowers' opinion on this subject is irrelevant and  
13 should be excluded.

14 **b. Trunk hair growth in adult males.** Bowers Decl. II, ¶ 3. The government has  
15 proffered only the circumstantial evidence from Ms. Bell that Mr. Bonds allegedly shaved  
16 his chest. Assuming our objection to that testimony is sustained, Dr. Bowers' opinion on  
17 this subject is irrelevant and should be excluded.

18 **c. Weakening of the heart.** Bowers Decl. II, ¶ 3. The government has not  
19 proffered a factual predicate. Dr. Bowers' testimony on this subject is irrelevant and  
20 should be excluded.

21 **d. Liver Damage.** Bowers Decl. II, ¶ 3. The government has not proffered a  
22 factual predicate. Dr. Bowers' testimony on this subject is irrelevant and should be  
23 excluded.

24 **e. Hypertension.** Bowers Decl. II, ¶ 3. The government has not proffered a factual  
25 predicate. Dr. Bowers' testimony on this subject is irrelevant and should be excluded.  
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1 **IV. CONCLUSION**

2 For all of the reasons set forth above, the Court should grant the motion to exclude  
3 the specified lay witness testimony purporting to describe physical characteristics of Mr.  
4 Bonds and to exclude expert opinion testimony that does not relate to a factual predicate in  
5 the record.

6 Dated: February 14, 2011

7 Respectfully submitted,

8 RUBY & SCHOFIELD

9 ARGUEDAS, CASSMAN & HEADLEY, LLP

10 RIORDAN & HORGAN

11  
12 By  /s/ \_\_\_\_\_

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